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In The

Supreme Court of the United States

October Term, 1994

William M. Kelley, Joseph S. Rossi, Robert E. Sims, Jeffrey Thompson, Matthew Gramm, John M. Mulloy, Peter Juiris and David M. Gargas,

Petitioners,

vs.

Board of Trustees of the University of Illinois, and Morton W. Weir, Ronald E. Guenther and Karol Kahrs, in their individual capacities, jointly and severally,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDIX TO PETITION

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ISSUES PRESENTED

1. Does Title IX of the Education Amendments of 1972 require a state to eliminate a men's athletic program because of the sex of its participants in order to increase the percentage of women participating in intercollegiate athletic competition?

2. Must a court of appeals give deference to regulations and interpretations of Title IX which directly conflict with the plain wording of the statute?

3. Does the Equal Protection Clause of the Fourteenth Amendment permit a state to increase the percentage of women participating in intercollegiate athletic competition by eliminating a men's athletic program without any finding that any differences in the rates of participation between men and women is due to clearly identifiable discrimination perpetuated by the state rather than to alleged broad-based societal discrimination?

4. Does Title IX of the Education Amendments of 1972 require a university with no knowledge as to whether it is effectively accommodating the interest of women in participating in intercollegiate athletics, and which cannot demonstrate a continuing practice of program expansion, to eliminate enough men from intercollegiate competition so that its proportion of men and women participating in intercollegiate athletics is equal to undergraduate enrollment of the respective sexes.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Review is sought of the opinion of the Seventh Circuit Court of Appeals, dated

September 1, 1994, appearing at Pages A.1 to A.26 of the Appendix, and reported at 35 F.3d 265 (1994.) The Seventh Circuit Court of Appeals denied a petition for rehearing on October 5, 1994. The order denying the petition is not published, and is reproduced at page A.27-28. The opinion of the district court is reproduced at Pages A.29 to A.54 of the Appendix and is reported at 832 F. Supp. 327 (C.D. Ill, 1993.)

JURISDICTION

Petitioners seek review of the opinion and judgment issued by the Seventh Circuit Court of Appeals on September 1, 1994. A motion for rehearing was denied October 5, 1994. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment 14, Section 1

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et. seq., as amended* by Section 908 of the Civil Rights Restoration Act of 1987.

These constitutional and statutory provisions are set forth in the Appendix (A.55 to A.63.)

STATEMENT OF THE CASE

This is an action brought by eight former members[1] of the University of Illinois varsity men's swimming team against the Board of Trustees of the University of Illinois[2]

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[1]Petitioners are all males. Kelley, Mulloy and Thompson were seniors; Sims was a junior, and Rossi, Juiris, Gramm and Gargas were freshmen in the 1993-94 academic year.

[2]The University of Illinois is a subdivision of the State of Illinois which operates an educational program receiving federal financial assistance at its Urbana-Champaign campus. Defendant Weir was chancellor of the Urbana-Champaign campus during the occurrences complained of, although he retired from his position on August 20, 1993. Defendant Guenther is director of

(hereafter "University,") its chancellor, athletic director and associate athletic director for violating Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et. seq., as amended* by Section 908 of the Civil Rights Restoration Act of 1987, in eliminating the men's swimming team[3] because of the sex of its participants.

For the academic year, 1992-93, the total undergraduate enrollment at the University was 25,846, of whom 56 percent (14,427) were male and 44 percent (11,419) were

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Champaign campus during the occurrences complained of, although he retired from his position on August 20, 1993. Defendant Guenther is director of intercollegiate athletics and Defendant Kahrs is associate athletic director and director of women's athletics, all at the Urbana-Champaign campus.

[3]The University has had varsity men's swimming teams since 1911. In the 1992-93 academic year, it awarded 11 scholarships to 28 male swimming team members. It has had women's varsity swimming teams since 1982. In the 1992-93 academic year, it awarded 14 scholarships to 18 female swimming team members.

female. In that same academic year, 474 undergraduates participated in intercollegiate athletics, of whom 76.58 percent (363) were male and 23.42 percent (111) were female. Those proportions had remained roughly the same during the prior three years.

Although fewer women participated, the University budgeted roughly the same amount of money ($220,000) for the men's varsity swimming program as for the women's swimming program in the 1991-92 and 1992-93 academic years.

The Office of Civil Rights of the U.S. Department of Education investigated the University's compliance with Title IX in the award of financial assistance and in the operation of other program areas in intercollegiate athletics in the early 1980's. At the conclusion of the investigation, the Office of Civil Rights issued a letter dated March 26, 1982, finding the University to be

in compliance with Title IX.

Between March 26, 1982 and May 7, 1993, the University never received any reports from the U.S. Department of Education indicating that the University was not in compliance with Title IX. Between March 26, 1982 and May 7, 1993, the University never completed any surveys to determine whether women's interests in athletics at the University were being fully and effectively accommodated.

Between March 26, 1982 and May 7, 1993, no women's club sports expressed any interest in becoming varsity sports, while two men's club sports, ice hockey and soccer expressed interest in becoming varsity sports.

The University is a member of the National Collegiate Athletic Association (NCAA) and the Big Ten Athletic Conference [hereinafter "Big Ten".] The basic decisions of the Big Ten are made by the Counsel of Ten, composed of the presidents and chancel-

lors of the 11 Big Ten universities.

On June 8, 1992, the Council of Ten issued a requirement that each institution in the Big Ten must achieve a 60-40 male to female participation rate in intercollegiate athletics. The rule was enforceable with sanctions, and applied irrespective of the male/female interest in intercollegiate sports at a particular campus. The University could achieve the 60-40 ratio by dropping men's sports, or by increasing women's sports.

Weir and Guenther were advised by University counsel not to make any changes in the University's sports sponsorships without first doing a "Title IX audit," which was to include a student interest survey and a review of sports participation expenditures No such audit was done, however, prior to May 7, 1993.

The overall budget of the University of Illinois is approximately $750 million a

year. No part of the athletic department budget comes from tuition or tax revenues. Substantially all of the athletic department's budget comes directly or indirectly from men's football and men's basketball games.

On May 7, 1993, the University announced a decision to eliminate its men's swimming program, effective July 1, 1993. The athletic board recommended the decision, but the final authority to make the decision was Weir's.

The men's swimming program was dropped and the women's swimming program was not dropped because it was the University's judgment that "participation rates" for female athletes "were not as high as they should be". There was no increase in participation opportunities for women at the University as a result of the action of May 7, 1993.

The petitioners filed their complaint in

the Central District of Illinois for preliminary and permanent injunctions against the University and damages against the individual defendants acting in their individual capacities, pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1985(3.) The district court had original jurisdiction of this action pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(a).

The district court issued an amended order September 1, 1993 granting defendants' motion for summary judgment and denying the motion by petitioners for a preliminary injunction as moot. 832 F. Supp. 327 (C.D. Ill, 1993.) [A.29 to A.54.] Petitioners filed a timely appeal to the Seventh Circuit Court of Appeals, which had jurisdiction based on 28 U.S.C. §1291 and 28 U.S.C. §1292(a)(1). The Court of Appeals issued its opinion affirming the district court on September 1, 1994, 35 F.3d 265 [A.1 to A.26] and on October 5, 1994, issued an order denying the petitioners' motion for a rehearing [A.27-

28.] This Petition for *Writ of Certiorari* follows.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS RENDERED BY THIS HONORABLE COURT

This Honorable Court has clearly stated that Title IX of the Education Act should be interpreted like Title VI of the Civil Rights Act of 1964, as amended. *Cannon v. University of Chicago*, 441 U.S. 677, 694-698 (1979.) Mr. Justice Stevens, writing for the Court noted, "Except for the substitution of the word "sex" in Title IX to replace the words "race, color or national origin" in Title VI, the two statutes use identical language to describe the benefited class." *Ibid*, 441 U.S. 677, 694.

Further, "The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years. *Ibid*, 441

In the context of challenges to racial preferences, this Court has held repeatedly that societal discrimination alone is never sufficient to justify a racial classificaton. *See, Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S. Ct. 1842 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989) in which the court held that before a public entity may adopt an affirmative action program favoring a protected group, there must be sufficient evidence to justify the conclusion that there has been prior discrimination and a plan narrowly tailored to correct the specific wrong.

This case is the Title IX equivalent to the Title VI case of *Regents of the University of California v. Bakke*, 438 US 265, 98 S Ct 2733 (1978.) As Justice Powell clearly stated for the plurality in *Bakke, Ibid*, it is the individual who is entitled to judicial protection against classifications based upon

his background (racial or ethnic in that case; sex in this case) because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group.

Mr. Justice Powell in *Bakke, Ibid.*, noted that in the three areas where this Court has approved preferential classifications (school desegregation, employment discrimination and sex discrimination) it has done so only under very special limited circumstances. In the school desegregation cases, the remedies were imposed for "clearly determined constitutional violations," *Bakke*, 438 US 235, at p.300, and the remedies were not permitted to exceed the scope of the violations.

He further noted that the racial preferences challenged by the plaintiff in *Bakke*, existed without a "judicial determination of constitutional violation as a predicate for the formulation of a remedial classifica-

tion." *Bakke, Ibid.* The Court said it has never approved preferential classifications in the absence of proved constitutional or statutory violations.

Title IX applies to all educational programs, not just athletics. The flaw in the reasoning of the Court of Appeals is readily observable when one considers the result of applying the same rules the Court of Appeals has adopted for athletics to other programs like home economics or mathematics. Surely, a university could not, consistent with Title IX, eliminate women from home economics programs where they are over-represented or men from mathematics programs where men are in the majority simply to balance the proportions of the sexes in those programs with their proportions in the undergraduate population.

Likewise, in applying the same principles of interpretation to race cases under Title VI, it is horrible to contemplate that

a University would consider itself compelled to eliminate blacks from the basketball team or whites from the tennis team in order to obtain race proportionality.

II. THE DECISION BY THE COURT BELOW CONFLICTS WITH THE PLAIN MEANING OF TITLE IX

There is nothing in the Title IX statute itself that remotely lends itself to the interpretation that until "proportionality" is reached between undergraduate student population and participation by males and females in varsity athletics, a university must discriminate against men.

Title IX could hardly be more clear in its language. It states in relevant part:

> "(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal assistance . . . .
>
> * * *
>
> "(b) Nothing contained in subsection (a) of this section shall be

> interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number of percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of benefits of, any such program or activity by the members of one sex."

The trial court found that "the plain meaning of Title IX" prohibiting discrimination on the basis of sex has been transformed by regulatory fiat into something that "Congress, in enacting Title IX, probably never anticipated [that it] would yield such draconian results."

This Court has stated that it is not proper to give deference to an agency inter-

pretation where "Congress has directly spoken to the precise question in issue." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

Here, the "proportionality safe harbor rule" advanced by the defendants and accepted by the Seventh Circuit does not even appear in any regulation promulgated by the Department of Education, which now has the responsibility of enforcing Title IX [34 C.F.R. §§106.1 *et. seq.*, 45 FR 30955, May 9, 1980.] The regulation does, as cited by the trial court require "equal athletic opportunity" for members of both sexes. Ten factors are listed for determining whether "equal opportunities" are available, starting with:

> "(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."[Emphasis added] 34 C.F.R. §106.41(c)(1)[4]

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[4]The other factors are: (2) The provision of equipment and supplies; (3) Scheduling of games and practice time;

It is noteworthy that the regulation is framed in terms of "interests and abilities," not substantial proportionality of participation in athletics to enrollment. Petitioners have no dispute with the regulation as worded, and the plain meaning of its words. The regulation, on its face, not only makes common sense, but is in keeping with the way the civil rights statutes regarding race have been interpreted, i.e. a member of a protected group does not make out a case of discrimination by showing only a disparity between the minority population and minority employment by a certain employer, but must

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(4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity. In none of these areas has there even been a claim that the University is not providing equal opportunity.

also show what percentage of minorities were qualified for and interested in the employment.

In this particular case, there was evidence, which must be credited in favor of petitioners as the non-movants in a motion for summary judgment, that the "interests and abilities" of men were not effectively accommodated, and there was no evidence that the "interests and abilities" of women were not effectively accommodated. Although advised by its Counsel to do so, the University made no study to determine whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes before deciding to discriminate against the petitioners.

The idea of proportionality first appears in a policy interpretation issued by the Department of Health, Education and Welfare [45 C.F.R. Part 86, 44 FR 71413, Dec 11, 1979.] Policy interpretations are not

owed any deference by the Courts. *Continental Training Services, Inc. v. Cavazos*, 893 F2d 877, 885, (7th Cir, 1990). *Also, See, Drake v. Honeywell, Inc*, 797 F2d 603 (8th Cir, 1986); *Class v. Norton*, 507 F2d 1058, 1062 (2d Cir, 1974) and *Pearce v. Department of Labor*, 647 F@d 716, 726 (7th Cir, 1981.)

The appeals court correctly asserts that petitioners do not dispute the validity of the applicable regulation, that being 34 C.F.R. §106.41, but challenge any requirement of statistical balancing. The appeals court then reasons that the statistical balancing is not mandated by the policy interpretation, but is only one of three "safe harbors." What the appeals court fails to consider, however, is that the University in this case did not come within any of the "safe harbors," hence its sex-based decision cannot be immunized by Title IX, the regulations interpreting it or the policy interpretation interpreting the regulations.

The University attempted to justify its sex-based decision in this case by stating that eliminating a men's team because of the sex of its participants moved it closer to a safe harbor. That kind of sophistry has not been countenanced by this Court in race cases, and should not be approved in this case.

CONCLUSION

For all of the foregoing reasons, the petitioners request this Court to grant their petition and review the erroneous decision of the United States Court of Appeals for the Seventh Circuit.

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Dated: November 30, 1994

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APPENDIX

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In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 93-3205
WILLIAM M. KELLEY, JOSEPH S. ROSSI,
ROBERT E. SIMS, *et al.*,

Plaintiffs-Appellants,

v.

BOARD OF TRUSTEES, University of Illinois,
MORTON W. WEIR, RONALD E. GUENTHER, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois
Peoria Division.
No. 93 C 1327--**Joe B. McDade**, Judge

ARGUED APRIL 11, 1994
DECIDED SEPTEMBER 1, 1994

Before CUMMINGS, FLAUM and KANNE,
Circuit Judges.

CUMMINGS, *Circuit Judge*. On May 7, 1993, the University of Illinois announced that it intended to terminate four varsity athletic programs, including the men's swimming program, effective July 1, 1993. On May 25,

1993, the plaintiffs, all members of the University of Illinois' men's swimming team prior to its termination, brought suit against the Board of Trustees of the University, its chancellor, athletic director and associate athletic director ("defendants"), alleging that defendant violated Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs' complaint sought damages, as well as an injunction prohibiting the defendants from terminating the men's swimming program, under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3). In response, defendants filed a motion to dismiss, which the parties agreed to convert to a motion for summary judgment. Plaintiffs moved for a preliminary injunction. After hearing testimony in support of plaintiffs' request for a preliminary injunction and receiving affidavits in support of defendants' motion for summary judgment, the district court

granted summary judgment in favor of the defendants and found that the request for a preliminary injunction was therefore moot. Plaintiffs now appeal.

I.

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 (1988)) provides that

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity [other than those specifically described in the Act] receiving Federal financial assistance. . . .

In 1974, Congress requested that the Secretary of the Department of Health, Education of Welfare prepare and publish regulations implementing the provisions of Title IX, "includ[ing,] with respect to intercollegiate athletic activities[,] reasonable provisions considering the nature of particular sports."

Pub.L. 93-380, 88 Stat. 612 (1974). Promulgated the following year, the pertinent regulation allows schools to field single-sex teams in certain circumstances[5] but requires that they "provide equal athletic opportunity for . . . both sexes." 34 C.F.R. § 106.41(c). Section 106.41(c) sets out the factors to be examined in determining whether a school provides equal athletic opportunity. Chief among these, and of primary concern here, is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." Although § 106.41(c) lists nine

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[5] An educational institution may (34 C.F.R. § 106.41(b)):

> [O]perate or sponsor separate teams for members of each sex where selection for such teams is based on competitive skill or the activity involved is a contact sport....For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

other factors,[6] an institution may violate Title IX solely by failing to accommodate effectively the interests and abilities of student athletes of both sexes. See *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824, 828 (10th Cir. 1993), certiorari denied, 114 S. Ct. 824; *Cohen v. Brown University*, 991 F.2d 888, 897-898 (1st Cir.

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[6] In determining whether a school has provided equal opportunities for men and women, factors to be considered include (34 C.F.R. § 106.41(c)):

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.

1993).

In 1979, the Department of Health, Education and Welfare, in an effort to encourage self-policing, issued a policy interpretation providing "guidance on what constitutes compliance with the law." 44 Fed. Reg. 71,413 (1979). According to the policy interpretation, an institution has effectively accommodated the interests of its male and female students if it satisfies any of three benchmarks:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the

developing interest and abilities of the members of that sex; or

(3) Where members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion ..., whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,418 (1979). In essence the policy interpretation establishes a presumption that "effective accommodation" has been achieved if males and females at a school participate in intercollegiate sports in numbers substantially proportionate to the number of students of each sex enrolled at the institution (Benchmark 1). If substantial proportionality has not been achieved, a school must demonstrate either that it has a continuing practice of increasing the ath-

letic opportunities of the underrepresented sex (Benchmark 2) or that its existing programs effectively accommodate the interests of that sex (Benchmark 3).

II.

In 1982, the Office of Civil Rights of the United States Department of Education[7] determined that the University of Illinois had denied its female students equal athletic opportunities. Relying on the University's representations that it would remedy the disparity within a reasonable period of time, the Office of Civil Rights concluded that the school was not in violation of Title IX. A

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[7] Although Title IX was initially administered by the Department of Health, Education and Welfare, Congress later created a distinct department for education and assigned to it the Department of Health, Education and Welfare's regulatory powers over education. After its creation the Department of Education adopted the regulation relevant here and, "as a practical matter" has treated the relevant policy interpretation as its own. *Cohen v. Brown University*, 991 F.2d 888, 896 (1st Cir. 1993).

decade later, however, female participation in intercollegiate athletics at the University of Illinois continued to be disproportionate to female undergraduate enrollment. Thus in 1993, for example, while women comprised 44% of the student body of the University, they accounted for only 23.4% of the school's intercollegiate athletes.

It was against this backdrop that the decision to cut the men's swimming program was made. Faced with a significant deficit in its athletic budget--$600,000 before the receipt of substantial, unanticipated income from a college football bowl game--the University determined that it would need to reduce athletic costs significantly. Determined to field only teams "capable of competing for championships in the Big Ten Conference [the athletic conference to which the University belongs] and the National Collegiate Athletic Association" (Appellees' Br. at 7), the University concluded that it would

have to discontinue certain intercollegiate teams in order to eliminate its deficit.

While the University's decision to reduce its athletic offerings was motivated by budget considerations, other considerations--including the need to comply with Title IX--influenced the selection of particular programs to be terminated. The final selection of the teams to be eliminated was made by defendant Morton Weir, then chancellor of the University's Urbana-Champaign Campus. In reaching his decision, Chancellor Weir relied on the recommendation of the Athletic Board of Control, a body that advises the chancellor on athletic issues. The Athletic Board of Control, in turn, relied on advice from the University's Athletic Director, defendant Ronald Guenther. In making his recommendation, Guenther evaluated all 19 sports offered by the University against seven criteria: (1) whether or not the Big Ten Conference and the National Collegiate

Athletic Association sponsored a championship in the sport; (2) the tradition of success of the sport at the University; (3) the level of interest and participation in the sport at the high school level; (4) the adequacy of the University's facilities for the sport; (5) the level of spectator interest in the sport; (6) gender and ethnic issues; and (7) the costs of the sport. Guenther recommended that four teams--men's swimming, men's fencing, and men's and women's diving--be cut, a recommendation adopted by Chancellor Weir.

Men's swimming was selected for termination because, among other things, the program was historically weak, swimming is not a widely offered athletic activity in high schools, and it does not have a large spectator following. The University did not eliminate the women's swimming program because the school's legal counsel advised that such action would put the University at risk of

violating Title IX.

III.

The University's decision not to terminate woman's swimming program was--given the requirements of Title IX and the applicable regulation and policy interpretation--extremely prudent. The percentage of women involved in intercollegiate athletics at the University of Illinois is substantially lower than the percentage of women enrolled at the school. If the University had terminated the women's swimming program, it would have been vulnerable to a finding that it was in violation of Title IX. Female participation would have continued to be substantially disproportionate to female enrollment, and women with a demonstrated interest in an intercollegiate athletic activity and demonstrated ability to compete at the intercollegiate level would be left without an opportunity to participate in their sport. *Roberts*, 998 F.2d at 828-832. The University could,

however, eliminate the men's swimming program without violating Title IX since even after eliminating the program, men's participation in athletics would continue to be more than substantially proportionate to their presence in the University's student body. And as the caselaw makes clear, if the percentage of student-athletes of a particular sex is substantially proportionate to the percentage of students of that sex in the general student population, the athletic interests of that sex are presumed to have been accommodated. *Cohen*, 991 F.2d at 898 (explicating applicable policy interpretation). The University's decision to retain the women's swimming program--even though budget constraints required that the men's program be terminated--was a reasonable response to the requirements of the applicable regulation and policy interpretation.

Plaintiffs contend, however, that the applicable regulation, 34 C.F.R. § 106.41,

and policy interpretation, 44 Fed. Reg. 71,418 (1979), pervert Title IX.[8] Title IX, plaintiffs contend, "ha[s] through some alchemy of bureaucratic regulation been transformed from a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males . . ." (Br. 9). Or, as plaintiffs put it later: "If a university is required by Title IX to eliminate men from varsity athletic competition . . ., then the same Title IX [sh]ould require the university to eliminate women from the academic departments where they are over[-]represented and men

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[8] Plaintiffs also contend that Title IX prohibited the University, when deciding which athletic programs to terminate, from taking gender into account. Plaintiffs, however, do not contend that the University considered gender any more than it was required to be the applicable regulation and policy interpretation--nor would the record support such a contention if made. Thus the plaintiffs' claim is, in essence, a claim that the relevant regulation and policy interpretation violate Title IX, an argument addressed *infra* at 8-11.

from departments where they have been over[-]represented. Such a result would be ridiculous." (Br. 10).

We agree that such a result would be ridiculous. But Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics. See, *e.g.*, *Sex Discrimination Regulations, Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor*, 94th Cong. 1st Sess. at 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh); 117 Cong. Rec. 30,407 (1971) (same). Congress therefore specifically directed the agency in charge of administering Title IX to issue, with respect to "intercollegiate athletic activities," regulations containing "reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, 88 Stat. 484, 612. And

where Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (Where Congress has expressly delegated to an agency the power to "elucidate a specific provision of a statute by regulation," the resulting regulations should be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

The regulation at issue here is neither "arbitrary . . . [n]or manifestly contrary to the statute." *Cf. id.* The regulation provides that notwithstanding Title IX's requirement that "[n]o person . . . shall, on the basis of sex, be excluded from participation in . . . any . . . activity," a school may "sponsor separate teams for members of each sex where selection for such teams is

based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(1)(a), (b). Such a provision is not at odds with the purpose of Title IX[9] and we do not understand plaintiffs to argue that it is. And since 34 C.F.R. § 106.41 is not manifestly contrary to the objectives of Title IX, this Court must accord it deference.

Plaintiffs, while they concede the validity of 34 C.F.R. § 106.41, argue that the substantial proportionality test contained in the agency's policy interpretation of that regulation establishes a gender-based quota system, a scheme they allege is contrary to the mandates of Title IX. But the policy interpretation does not, as plaintiffs suggest, mandate statistical balancing. Rather the policy interpretation merely

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[9] Congress would indeed be surprised to learn that Title IX mandated co-ed football teams.

creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance.[10] Even if substantial proportionality has not been achieved, a school may establish that it is in compliance by demonstrating either that it has a continuing practice of increasing the athletic opportunities of the underrepresented sex or that its existing programs effectively accommodate the interests of that sex.

Moreover, once it is agreed Title IX does not require that all teams be co-ed--a point the plaintiffs concede--and that 34 C.F.R. § 106.41 is therefore a valid regulation, schools must be provided some means of establishing that despite offering single-sex teams, they have provided "equal athletic

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[10] We express no opinion as to whether, if the policy interpretation did in fact mandate substantial proportionality, it would be unconstitutional or in contravention of the statute.

opportunit[ies] . . . for both sexes."[11] Undoubtedly, the agency responsible for enforcement of the statute could have required schools to sponsor a women's program for every men's program offered and vice versa. Requiring parallel teams would certainly have been the simplest method of ensuring equality of opportunity--and plaintiffs would doubtless have preferred this approach since, had it been adopted, the men's swimming program would likely have been saved. It was not unreasonable, however, for the agency to reject this course of action. Requiring parallel teams is a rigid approach that denies schools the flexibility to

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[11] In the three years following the issuance of 34 C.F.R. § 106.41, the Department of Health, Education and Welfare received over one hundred discrimination complaints involving over fifty schools. The policy interpretation here at issue was promulgated in an effort to enable these schools and others to establish whether they were in compliance with Title IX. *Cohen*, 991 F.2d at 896.

respond to the differing athletic interests of men and women.[12] It was perfectly acceptable, therefore, for the agency to chart a different course and adopt an enforcement scheme that measures compliance by analyzing how a school has allocated its various athletic resources.[13]

This Court must defer to an agency's interpretation of its regulations if the interpretation is reasonable, *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, a standard the policy interpretation at issue here meets. Measuring compliance through an evaluation of a school's allocation of its athletic resources

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[12] Requiring parallel teams would, for example, require the University either to terminate the football program or to begin a women's team, even if female students had little interest in that sport but had great interest in other sports.

[13] The three benchmarks established by the agency's policy interpretation all assess compliance in this manner. These benchmarks are set out *supra* at 4.

allows schools flexibility in meeting the athletic interests of their students and increases the chance that the actual interests of those students will be met. And if compliance with Title IX is to be measured through this sort of analysis, it is only practical that schools be given some clear way to establish that they have satisfied the requirements of the statute. The substantial proportionality contained in Benchmark 1 merely establishes such a safe harbor. *Roberts*, 998 F.2d at 828.

Since the policy interpretation maps out a reasonable approach to measuring compliance with Title IX, this Court does not have the authority to condemn it. *Martin*, 499 U.S. at 150. Plaintiffs' claim that the University of Illinois violated Title IX when it terminated the men's swimming program is, therefore, rejected. The University's actions were consistent with the statute and the applicable regulation and policy interpreta-

tion. And despite plaintiffs' assertions to the contrary, neither the regulation nor the policy interpretation run afoul of the dictates of Title IX.

IV.

Plaintiffs' final argument is that the defendants' decision to eliminate the men's swimming program while retaining the women's program denied them equal protection of law as guaranteed by the Fourteenth Amendment. We do not agree. First, the record makes clear that the University considered gender solely to enure that its actions did not violate federal law. And insofar as the University actions were taken in an attempt to comply with the requirements of Title IX, plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible. *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 419, 424 (7th Cir. 1991), certiorari denied, 500 U.S. 954.

To the extent that plaintiffs' argument is that Title IX and the applicable regulation--rather than the actions of the defendants--are unconstitutional, it is without merit. While the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometime consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution. Congress has broad powers under the Due Process Clause of the Fifth Amendment to remedy past discrimination. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 565-566. Even absent a specific finding that discrimination has occurred, remedial measures mandated by Congress are "constitutionally permissible to the extent that they serve important governmental objectives . . . and are substantially related to achievement of those ends." *Id.* at 565; see also *Mississippi University for Women v. Hogan*, 458 U.S.

718, 728. There is no doubt but that removing the legacy of sexual discrimination--including discrimination in the provision of extra-curricular offerings such as athletics--from our nation's educational institutions is an important governmental objective. We do not understand plaintiffs to argue otherwise.

Plaintiffs' complaint appears, instead, to be that the remedial measures required by Title IX and the applicable regulation and policy interpretation are not substantially related to their purported goal. Plaintiffs contend that the applicable rules allow "the University to. . .improve[] its statistics without adding any opportunities for women . . ." (Br. 23), an outcome they suggest is unconstitutional. But to survive constitutional scrutiny, Title IX need not require--as plaintiffs would have us believe--that the opportunities for the underrepresented group be continually expanded. Title IX's stated

objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex. And the remedial scheme established by Title IX and the applicable regulation and policy interpretation are clearly substantially related to this end. Allowing a school to consider gender when determining which athletic programs to terminate ensures that in instances where overall athletic opportunities decrease, the actual opportunities available to the under-represented gender do not. And since the remedial scheme here at issue directly protects the interests of the disproportionately burdened gender, it passes constitutional muster. *Mississippi University for Women,* 458 U.S. at 728 ("[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is dispropor-

tionately burdened."); see also *Cohen*, 991 F.2d at 900-901 (holding that Title IX and the applicable regulation and policy interpretation do not violate the Equal Protection Clause).

V.

Since the district court correctly determined that the University of Illinois decision to terminate the men's swimming program did not violate Title IX or the Equal Protection Clause, its decision is affirmed.

A true Copy:

Teste:_____
Clerk of the United States Court of
Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 5, 1994.

No. 93-2305

Before

. . **Hon.** Walter J. Cummings, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

WILLIAM M. KELLEY, JOSEPH S. ROSSI ROBERT E. SIMS, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Central District of Illiois, Peoria Division
vs.	)	No. 93-C-1327
BOARD OF TRUSTEES, University of Illinois, MORTON W. WEIR, RONALD E. GUENTHER, et. al., Defendants-Appellees.	)	Joe B. McDade, *Judge*

ORDER

On consideration of the petition for rehearing en banc filed by plaintiffs-appel-

lants on September 15, 1994, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

WILLIAM M. KELLEY, et. al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 93-1327
	)	
BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER[1]

Before the Court is Plaintiffs' Motion for a Preliminary Injunction (docket #10); the Defendants' Motion to Dismiss (docket #6) and the Defendants' Motion for a Protective Order (docket #15). Pursuant to Rule 12(b)(6), the parties have stipulated that the Motion to Dismiss must be converted into a Rule 56 Motion for Summary Judgment because

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[1]This Order is a supplement to the Order entered on August 26, 1993, at the close of arguments and testimony concerning the summary judgment motion and includes citations not previously included. This Order also includes certain minor additions to or deletions from the oral Order.

it presents matters outside the pleadings.

Federal Rule 56(c) Summary Judgement is appropriate when there remains no genuine issue of material fact upon which a reasonable jury (or trier of fact) could find in favor of the non-moving party, and the moving party is entitled to judgment as a matter of law. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . ." Celotex Corp. v. Catrett, 477 U.S. 317, 322-27, 106 S.Ct. 2548, 2552-55 (1986). Thus, although the moving party on a motion for summary judgment is responsible for demonstrating to the court why there is no genuine issue of material fact, the non-moving party must go beyond the face of the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file, to show that a rational jury (or trier of fact) could return a verdict in this party's favor. Celotex Corp. v. Catrett, 477 U.S.

317, 322-27, 106 S. Ct. 2548, 2552-55 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55, 106 S. Ct. 2505, 2513-14 (1986); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1355-56 (1986). Consequently, the inquiry on summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether the evidence is so one-sided that one party must prevail as a matter of law. Anderson, 477 U.S. at 251-52. Disputed facts are material when they might affect the outcome of the suit. First Ind. Bank v. Baker, 957 F.2d 506, 507-08 (7th Cir. 1992). A meta-physical doubt will not suffice. Matsushita, 475 U.S. at 586. Nonetheless, the Court must view all inferences to be drawn from the facts in the light most favorable to the opposing party. Anderson, 477 U.S. at 247-48. Beraha v. Baxter Health Corp., 956 F.2d 1436, 1440 (7th Cir. 1992). After reviewing

the parties' briefs and hearing oral arguments and testimony on the motions, the Court has made the following findings of fact and conclusions of law. They are not meant to be exhaustive.

FACTS

The undisputed facts are as follows. the Court has jurisdiction in this matter pursuant to Title 28 U.S.C. § 1331; Title 28 U.S.C. §1343(3); Title 38 U.S.C. §1681(a); Title 42 U.S.C. §1983; and the Fourteenth Amendment to the United States Constitution. Plaintiffs allege that Defendants discriminated against them on the basis of sex by cutting men's swimming team, but not the women's swimming, in violation of Title IX, 20 U.S.C. §1681. Plaintiffs also allege that the University's action violated the equal protection clause of the Fourteenth Amendment, pursuant to 42 U.S.C. § 1983, and 42 U.S.C. § 1985 (3).

Plaintiffs are males and members of the

men's swimming team at the University of Illinois. Plaintiffs Kelley, Mulloy, and Thompson will be seniors in the 1993-94 academic year; Plaintiff Sims will be a junior in the 1993-94 academic year; and Plaintiffs Rossi, Juiris, Gramm and Gargan will be sophomores in the 1993-94 academic year.

Defendant Board of Trustees of the University of Illinois is a subdivision of the State of Illinois which operates an educational program receiving federal financial assistance at its Urbana-Champaign campus. Defendant Mortin W. Weir is Chancellor of the University of Illinois' Urbana-Champaign campus and acted in his individual capacity under color of law during occurrences complained of herein.[2] Defendant

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[2]Mortin W. Weir retired from his position as Chancellor of the University of Illinois on August 20, 1993. *See* Deposition of Mortin Weir, Exhibit 1 to Defendants' Motion for Summary Judgment.

Ronald E. Guenther is Director of Intercollegiate Athletics at the University of Illinois' Urbana-champaign campus and acted in his individual capacity under color of law during occurrences complained of herein. Defendant Karol Kahrs is Associate Athletic Director and Director of Women's Athletics at the University of Illinois' Urbana-Champaign campus and acted in her individual capacity under color of state law during the occurrences complained of herein.

The University of Illinois has had varsity men's swimming teams since 1911, and in the 1992-93 academic year 11 scholarships were awarded among 28 male swimming team members. the University of Illinois has had varsity women's swimming teams since at least 1982, and in the 1992-93 academic year 14 scholarships were awarded among 18 female swimming team members.

The men's varsity swimming season for the academic year 1993-94 was scheduled to

begin in September, 1993. On May 7, 1993, however, the University of Illinois announced that it intended to eliminate the varsity programs for men's swimming and fencing and men and women's diving, effective July 1, 1993. The announcement stated that "budget constraints" were the primary reason for the Athletic Board's decision. Nonetheless, the University indicated that it intended to honor the financial commitments to the student athletes on scholarship who were affected by the cuts.

The Court finds that financial and budgetary constraints were the primary considerations involved in the University's decision to eliminate the men's swimming team, but that other considerations, such as compliance with Title IX and the "gender equity" policy of the Big Ten Conference, also played a role. The University of Illinois is a member of the Big Ten Conference, a group of 11 universities who associ-

ate together for the purpose of competing in intercollegiate athletics. the Big Ten Conference promulgated what is referred to as a "gender equity" policy requiring member institutions to accept a percentage factor of 60 percent for men and 40 percent for women as the goal for male-female participation in varsity sports programs.

Affidavits submitted by Patricia Askey, Director of the Office of Admissions and Records, and Rick Allen, Director of Compliance for the Division of Intercollegiate Athletics at the University of Illinois at Urbana-Champaign, indicate that the following statistics represent the numerical composition of the undergraduate student population of men and women compared to the numerical composition of the men and women participating in intercollegiate sports during the last three academic years.[3]

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[3]At the hearing, the parties stipulated to statistics which are

Year 1990-91

	Total	Men	%	Women	%
UG:	26,445	14,925	(56.00%)	11,520	(44.00%)
Sports:	558	421	(75.45%)	137	(24.55%)

Year 1991-92

	Total	Men	%	Women	%
UG:	26,366	14,787	(56.00%)	11,579	(44.00%)
Sports:	550	413	(75.09%)	137	(24.91%)

Year 1992-93

	Total	Men	%	Women	%
UG:	25,846	14,427	(56.00%)	11,419	(44.00%)
Sports:	474	363	(76.58%)	111	(23.42%)

These statistics show that during the past three school years student enrollment and total sports participation by men and women went down at the University of Illinois campus at Urbana-Champaign. Interesting

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slightly different than those presented in the affidavits. See Deposition of Mortin W. Weir, Exhibit 1, Defendants' Motion for Summary Judgment. Nonetheless, the disparities remain substantially the same for purposes of a decision in this case.

enough, though, for the academic year 1992-93, men's participation went up by more than a percentage point to 76.58 percent, while women's participation went down by more than a percentage point to 23.42 percent.

TITLE IX

In Count I, Plaintiffs present a legal question which has not been directly decided by any court in this country to date. Although gender discrimination cases have been filed by female athletes against universities under Title IX, this is the first case known to the Court which has been brought against a university by men alleging gender discrimination in violation of Title IX.

Resolution of this question has been difficult. The difficulty arises because, in the context of athletics, the plain meaning of Title IX has been limited by the implementing regulations, the policy interpretation of those regulations and the case law interpreting each of these sources. *See*

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993); Roberts v. Colorado State, 1993 WL 248228 (10th Cir. 1993); Cook v. Colgate University, 992 F.2d 17 (2d Cir. 1993); Favia v. Indiana University of Pennsylvania, 812 F. Supp. 578 (W.D. Penn. 1993); 34 C.F.R. §106.41 (1993); 44 Fed. Reg. 71413-23 (1979). Quite frankly, these interpretations have converted Title IX from a statute which prohibits discrimination on the basis of sex (defined as the elimination of or exclusion from participation opportunities), into a statute which provides "equal opportunity for members of both sexes."[4]

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[4]In fact, Title IX flatly states:

> **Section 1681. Sex**
>
> **(a) Prohibition against discrimination**
>
> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial

assistance. . . .

20 U.S.C. § 1681(a).

Although § 1681(b) clearly states that § 1681(a) does not require "preferential treatment" for the statistically underrepresented sex, the implementing regulations for Title IX, found at 35 CFR § 106.41, interpret § 1681(a)'s prohibition of exclusion on the basis of sex as a vehicle to provide "equal opportunity" to members of both sexes. The regulations provide in relevant part:

> **§ 106.41. Athletics**
>
> (a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> * * *
>
> (c) *Equal Opportunity.* A recipient which operates or sponsors interscholastic or intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors:

"Equal opportunity," however, does not necessarily require "strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body." Cohen v. Brown University, 991 F.2d 881, 894 (1st Cir. 1993). In fact, as interpreted and enforced by the regulations, the University may provide "equal opportunity" to members of each gender in one of three ways: (1) "the participation opportunities for male and female students are in substantially proportionate numbers to their respective enrollments;" (2) the "interests and abilities" of the sex which is underrepresented with respect to their undergraduate enrollment are "fully and effectively accommodated by the present

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(1) Whether the selection of sports and level of competition effectively accommodate the interests and abilities of members of both sexes.

program;" or (3) the underrepresented gender's interests and abilities will be accommodated by "expansion" of the athletic program. 44 Fed. Reg. at 71418.

Program expansion was not the objective in this case; rather, financial constraints motivated and required the University of Illinois to cut programs. Even if the University's decision was not based on financial or budgetary reasons, but made solely to move closer to substantial proportionality (that is, to increase participation opportunities for women to a level equivalent with the percentage of female undergraduate enrollees), the failure to cut women's programs would still be countenanced by Title IX. As stated by the First Circuit Court of Appeals in Cohen v. Brown, 991 F.2d 888, 898, footnote 15:

> If in the course of adding and upgrading teams, a university attains gender parity between its athletic program and its student body, it meets the first benchmark

> of the accommodation test. But, Title IX does not require that a student pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).

Consequently, due to financial constraints and the need to comply with Title IX, the University chose to drop the men's swimming team without dropping the women's swimming team, because men's participation in athletics was more than substantially proportionate to their enrollment, but women's participation was not.[5]

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[5]The desire or concern of the University to comply with the "Gender Equity" Policy of the Big Ten Conference mandating an ultimate goal of 60/40 male/female percentage participation in athletics does not preempt compliance with Title IX requirements of equal opportunity for males and females. Accordingly, the University's actions must be measured by Title IX

Under Title IX, the University could cut men's programs without violating the statute because men's interests and abilities are presumptively met when substantial proportionality exists. Conversely, women's programs could not be cut because their level of participation was already disproportionate to their respective enrollment, and thus the University would be vulnerable to a finding of noncompliance with Title IX if the University failed to "fully and effectively accommodate [women's] interests and abilities."[6] *See* 44 Fed. Reg. at 71418.

In other words, according to the regulations and the case law, members of the men's swimming team have not been discriminated

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requirements.

[6]Notably, the University may have violated Title IX by dropping the women's diving team, which defendants admit would have been a hard case to defend if the sole woman diver was a plaintiff in this case (at least that is how the Court interprets defense counsel's response.)

against under Title IX. Even though elimination of their programs excluded them from varsity participation as individuals, the percentage of all men participating in the varsity program is more than "substantially proportionate" to the percentage of men represented by the undergraduate population. This status did not change following the cut. Cohen v. Brown University, 991 F.2d 888, 906 (1st Cir. 1993); Roberts v. Colorado State, 1993 WL 248228 (10th Cir. 1993); Cook v. Colgate University, 992 F.2d 17 (2d cir. 1993); Favia v. Indiana University of Pennsylvania, 812 F.Supp. 578 (W.D. Penn. 1993). *See also* 44 Fed. Reg. at 71418.

Although the law might be interpreted differently, the Court must give deference to regulations and interpretations promulgated under the authority of Congress and existing case law interpreting Title IX. Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 844, 104 S.Ct.

2778, 2782, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). Accordingly, Plaintiffs' claim under Title IX fails, and Defendants are entitled to Summary Judgment in Count I.

EQUAL PROTECTION

Plaintiffs also raise equal protection arguments in Counts II and III. Count II alleges that Defendants' decision to eliminate the men's swimming team, but not the women's team, created an illegal gender classification which denied Plaintiffs' equal protection of the law under the Fourteenth Amendment, in violation of 42 U.S.C. § 1983. Count III alleges a conspiracy in violation of 42 U.S.C. §1985(3) in that Defendants, together with unnamed athletic directors and associate athletic directors, conspired to deny Plaintiffs' civil rights in violation of Title IX and the Fourteenth Amendment.

To state an equal protection claim, a plaintiff must allege in the pleadings that

the government intentionally discriminated against plaintiff by classifying him or her for different treatment under the law than one similarly situated. *See* J. Nowak & R. Rotunda, Constitutional Law §14.2 at 570 (4th ed. 1991). To violate the equal protection clause, the government must intentionally classify similarly situated individuals for different treatment on the basis of an impermissible characteristic, such as race, national origin, or gender.

Gender classifications are subject to an "intermediate" standard of scrutiny. To withstand constitutional challenge under this standard, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197, 97 S. Ct. 451, 457, 50 L. Ed. 2d 397 (1976), *rehearing denied*, 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed.2d 574 (1977).

"In limited circumstances, a gender

based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." Mississippi University for Women v. Hogen, 458 U.S. 718, 728, 102 S.Ct. 3331, 3341, 73 L. Ed.2d 1090, 1100 (1981). These classifications establish what is commonly referred to as "reverse discrimination" and/or "affirmative action" for the purpose of remedying historical discrimination.

In cases where men have sued alleging gender discrimination under the Fourteenth Amendment, the Supreme Court has upheld these classifications when they serve a compensatory, remedial purpose of eradicating past discrimination against women, i.e. reversing the effects of laws which classified men for benefits under the law and women for burdens. Mississippi University for Women v. Hogen, 458 U.S. 718, 728, 102 S. Ct. 3331, 3341, 73 L. Ed. 2d 1090, 1100 (1981), *citing*,

Schlesinger v. Ballard, 419 U.S. 498, 95 S.Ct. 572, 42 L. Ed. 2d 610 (1975); Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L. Ed. 2d 360 (1977). However, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying the statutory scheme." Hogen, 458 U.S. at 728. State officials must actually prove that women "lacked opportunities." Hogen, 458 at 729. Once this showing is made, the officials must then satisfy the second prong of the intermediate standard, establishing that the classification is "substantially related" to the achievement of the remedial purpose alleged.

Title IX, as interpreted by the Court, is designed to remedy gender discrimination against underrepresented athletes -- either men or women.[7] In this case, the underrepre

[7]Plaintiffs argue that "underrepresented gender" refers to the

sented athletes are women. Although the University's decision to eliminate the men's swimming team rather than the women's swimming team classifies men for different treatment than women on the basis of gender, this action was taken in compliance with Title IX. Compliance with Title IX serves a remedial purpose which qualifies as an important state interest which is substan-

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interest and ability level of either gender rather than disproportional representation among men or women. According to this theory, statistical disparities which merely reflect participation rates do not necessarily indicate that women's interests and abilities are underrepresented. Rather, Plaintiffs contend that without proof of unmet interests and abilities among women athletes, Defendants' decision to cut the men's swimming team made them an "underrepresented gender" for purposes of Title IX, by eliminating demonstrated interest and ability among men. Although this argument has logical appeal, it undermines the interplay between the "safe harbor" of "substantial proportionality" (i.e. numerical equality) and "accommodation" of the "underrepresented gender's interests and abilities," as alternative forms of compliance with Title IX. 44 Fed. Reg. at 71418.

tially related to eradicating historical discrimination against women in athletics at the University of Illinois. Accordingly, the Court finds that the Defendants have not violated the equal protection clause of the Fourteenth Amendment. Therefore, Summary Judgment is granted on Count II in favor of Defendants.

Plaintiffs cannot prevail in Count III under § 1985(3) unless they can show an equal protection violation. For the reasons stated above, the Court also grants summary judgment in favor of Defendants on Count III.

CONCLUSION

The Court is not unsympathetic to the plight of members of the men's swimming team and recognizes that Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results. On the other hand, university athletic programs are designed, in their purest intent, to provide an education, coupled with equal access to

athletic opportunities for men and women -- a desirable result which had not been achieved prior to Title IX.

Plaintiffs' case has emotional appeal because it graphically demonstrates the inherent unfairness of decisions which classify and isolate one gender for burdens that the other gender is not required to bear. Certainly it must be acknowledged that the members of the men's swimming team are innocent victims of Title IX's benevolent attempt to remedy the effects of an historical deemphasis on athletic opportunities for women. The Court sincerely sympathizes with the personal loss felt by members of the men's swimming team while recognizing the salutary effects of Title IX for women athletes. Women have paid and continue to pay for discriminatory actions and attitudes which have historically excluded them from the athletic opportunities given to men, as represented by current statistical dispari-

ties among athletes in universities and colleges across the country. These are the disparities Title IX, and this decision, seek to remedy.

Plaintiffs concede that not only does the University of Illinois have a right to cut programs, but also that the men's swimming team does not have a constitutional right to the continuation of the swimming program. See Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987). However, Plaintiffs are requesting gender equity, or gender equality, in sharing the loss. This seems a fair request but conflicts with the imperatives of Title IX, which require that women, who have traditionally been underrepresented in college athletics, be assured equal athletic opportunities. To effectuate this legitimate objective, a sharing of the burden by innocent parties is not permissible and is rather light in this case when we consider the scope of the total men's athletic pro-

grams at the University of Illinois and their disproportionate participation in athletics as compared to their undergraduate enrollment. *Cf.* Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976).

In summary, the Court grants Defendants' Motion for Summary Judgment on Counts I, II, and III, rendering Plaintiffs' Motion for a Preliminary Injunction and Defendants' Motion for a Protective Order Moot. The Clerk of the Court is directed to enter judgment in favor of Defendants and against Plaintiffs. Each party is to bear their own costs. This case is terminated.

Entered this 1st day of September, 1993.

/s/ Joe B. McDade
United States District Judge

United States Constitution, Amendment 14:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

20 U.S.C. §1681, *as amended* by Section 908 of the Civil Rights Restoration Act of 1987

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that;

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for

six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with

the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation

under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any

secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) **Father-son or mother-daughter activities at educational institutions**

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) **Institution of higher education scholarship awards in "beauty" pageants**

this section shall not apply with respect to any scholarship or other financial

assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such beauty pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any

federally supported program or activity, in comparison with the total number or percentage of persons of that sex, in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each

such school, college, or department.

(Pub. L. 92-318, Title IX, §901, June 23, 1972, 86 Stat. 373; Pub. L. 93-568, §3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94-482, Title IV, §412(a), Oct. 12, 1976, 90 Stat. 2234; Pub. L. 96-88, Title III, §301(a)(1), Title V, §507, Oct. 17, 1979, 93 Stat. 677, 692; Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095.)

PART 106--NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITTING FROM FEDERAL FINANCIAL ASSISTANCE

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Appendix A--Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs [Note]

Source: 45 FR 30955, May 9, 1980, unless otherwise noted.

Subpart A--Introduction

§106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Publ. L. 93-568, 88 Stat. 1855 and sec. 844, Education Amendments of 1974, 88 Stat. 481, Pub. L. 93-380)

§106.2 Definitions.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S. C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

(e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to

review the decisions of, administrative law judges in cases arising under this part.

(f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of

insurance or guaranty.

(h) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended directly or through another recipient and which operates an educational program or activity which receives or benefits form such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a

preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of

study.

(l) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(n) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *Administratively separate unit* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership or matriculation in or at an education program or activity operated by a

recipient.

(q) *Student* means a person who has gained admission.

(r) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1661, 1662)

[45 FR30955, May 9, 1980; 45 FR 37426, June 3, 1980]

§106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as

the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative actions to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activ-

ity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c) (iii) of this section.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 29 U.S.C. 1681, 1682)

§106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In

the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of

the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 29 U.S. C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

§106.5 Transfers of property

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any educational program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.6 Effect of other requirements

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S. C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Authority: Secs. 901, 902, Education

Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title

IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to §106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later; which notification shall include publication in:

(i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications

distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall

apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B--Coverage

§106.11 Application.

Except as provided in this subpart, this part 106 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 86298, Dec. 30, 1980]

§106.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the

extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Authority: Secs. 901, 902. Education

Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth

service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age. (Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

§106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes of only of this section, §§106.16 and 106.17 and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient.

A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

§106.16 Educational institutions eligible to submit transition plans.

(a) *Applications.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the Secretary as described in §106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.17 Transition plans.

(a) *Submission of plans.* An institution to which §106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting each plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the

chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the

period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which §106.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to

enrolling students of the sex previously excluded.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart C--Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon

the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or

marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of any applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of any applicant for admission, but only if such inquiry is made equally of such

applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901,902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682.)

§106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A

recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such dispro portionately adverse effect, are shown to be unavailable.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient

shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this sub part.

(Authority: Secs. 901, 902. Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Authority: Secs. 901, 902, Education

Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in §106.61.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, *fringe benefits* means:

Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Authority: secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action;

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude fro employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom any tempo-

rary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate

of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373,374; 29 U.S.C. 1682, 1682)

§106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20

U.S.C. 1681, 1682)

§106.59 Advertising

A recipient shall not in any advertisement related to employment indicate preference, limitation, specification, discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§160.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimina-

tion prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facil-

ity used only by members of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart F--Procedures [Interim]

§106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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No. 94-1091

In The
Supreme Court of the United States
October Term, 1994

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Petitioners,

vs.

Board of Trustees of the University of Illinois, and Morton W. Weir, Ronald E. Guenther and Karol Kahrs, in their individual capacities, jointly and severally,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Title IX permits the University of Illinois to eliminate its men's varsity swimming program where males are overrepresented in the athletic program, when their participation rate in athletics is compared to males' representation in the student body as a whole?

2. Whether substantial deference should be given to the regulations and Policy Interpretation implementing Title IX, where Congress delegated authority to effectuate Title IX to the Department of Health, Education & Welfare?

3. Whether the District Court and Seventh Circuit Court of Appeals properly interpreted the regulations and Policy Interpretation effectuating Title IX, which permit the University to eliminate athletic teams of an overrepresented gender to move towards substantial proportionality between the genders in its athletic program as a whole?

4. Whether the University of Illinois' action in retaining the women's varsity swimming program, consistent with the letter and spirit of Title IX, achieves important governmental objectives of eliminating historical gender discrimination against women and is substantially related to the achievement of those objectives, making such action consistent with equal protection guarantees?

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STATEMENT OF THE CASE

The Respondents wish to supplement the Petitioners' Statement of the Case. Although the Petitioners mention that the Office for Civil Rights of the U.S. Department of Education issued a letter dated March 26, 1982, finding the University to be in compliance with Title IX, they fail to mention certain facts. As recognized by the Court of Appeals in its decision below, the Office for Civil Rights determined that the University of Illinois had denied its female students equal athletic opportunities. (A. 8)*. The Office

*For ease of reference, the citations in this Brief in Opposition are to the Appendix submitted by the Petitioners with the Petition for Writ of Certiorari.

for Civil Rights concluded that the University was not in violation of Title IX by relying on the University's representations that it would remedy the disparity within a reasonable period of time. (A. 8). Female participation in intercollegiate athletics at the University of Illinois, however, continued to be disproportionately low when compared to female undergraduate enrollment. (A. 9).

The decision to reduce the University's athletic program was motivated by budget considerations. (A. 10). The men's swimming program was dropped not because the University determined that "participation rates for female athletes were not as high as they should be" as argued by the Petitioners, but based on an evaluation of that sport against the same seven criteria which were used to evaluate all sports. (A. 10-11). Men's swimming was terminated because, among other things, the program was historically weak, swimming is not a widely offered athletic activity in high schools, and the sport does not have a large spectator following. (A. 11). The women's swimming program was not eliminated because the University's legal counsel advised that such action would put the University at risk of violating Title IX. (A. 11-12).

SUMMARY OF ARGUMENT

Certiorari should not be granted in this case because the Seventh Circuit's decision does not conflict with the decision of any other United States Court of Appeals. Rather, its decision is consistent with the decisions of other appellate courts. Moreover, the Seventh Circuit's decision does not conflict with decisions rendered by this honorable Court, but is also consistent with them.

The decision of the Seventh Circuit is also consistent with the letter and spirit of Title IX. The Petitioners' argument that the Seventh Circuit's decision conflicts with the plain meaning of the statute is over simplistic and ignores the history and intent behind Title IX. The Seventh Circuit followed the regulations and Policy Interpretation under Title IX, which are consistent with the guarantees of the Equal Protection Clause.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND WITH CASES DECIDED BY THIS HONORABLE COURT

Three United States Courts of Appeals have considered Title IX's application to intercollegiate athletics, in addition to the Seventh Circuit's decision in this case. In *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3rd Cir. 1993), the Third Circuit affirmed the district court's refusal to modify a preliminary injunction, concluding that the university could not replace its women's gymnastics program with a soccer program even though the net effect would be to move the university towards Title IX compliance, because women remained underrepresented in their proportionate share of athletic opportunities. In *Cohen v. Brown University*, 991 F. 2d 888 (1st Cir. 1993), the First Circuit specifically held that a university need not add athletic teams for the underrepresented gender to meet Title IX's requirements. Universities also have the option of moving towards compliance with Title IX's substantial proportionality test by reducing opportunities for the overrepresented gender, while keeping opportunities stable for the underrepresented gender. 991 F.2d at 898, Note 15. In *Roberts v. Colorado State*, 998 F.2d 824 (10th Cir. 1993), cert. denied ____ U.S. ____, 114 S.Ct. 580 (1993), the 10th Circuit recognized "that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletic programs. . . Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population." 998 F.2d at 830. The court explained its holding in a related footnote, as follows:

> Title IX does not require that a school pour ever increasing sums into its athletic establishment. If a university prefers

> to take another route, it can also bring itself into compliance with the first bench mark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent). 998 F.2d at 830, Note 9.

The Seventh Circuit's decision is consistent with these other circuit court cases.

Moreover, the Seventh Circuit's decision does not conflict with any decisions rendered by this Court. This case is very different than the Title VI case of *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), despite what Petitioners might think. In *Bakke*, the University of California, on its own, developed a student admissions policy that granted a racial preference to minority applicants. In the case before this Honorable Court, the University of Illinois did not grant preferential treatment to women. Any determination granting such a preference was made by the Department of Health, Education & Welfare when it promulgated the regulations implementing Title IX (A. 64-109), and the Policy Interpretation of Title IX, which were applied by the Seventh Circuit and have become the touchstone for measuring Title IX compliance. The University was simply following the letter and spirit of the law. Consequently, *Bakke* is not an appropriate analogy.

Moreover, this case does not involve a set aside program, which was at the heart of the *Bakke* case. There, the University of California reserved a certain number of seats in the incoming class exclusively for minority applicants. Here, on the other hand, the University of Illinois has not set aside a specific number of athletic participation opportunities for women. Gender was only one factor in the University's decision, and then only to the extent that it protected the women's swimming program from elimination (A. 11-13). *Bakke* recognizes that race may be one of many factors used in making admissions decisions but it may not be the only factor. Gender was only one of many factors, in the sense that the underrepresentation of the women protected their program from elimination, making this case consistent with *Bakke*, if this Court's decision in that case is considered by analogy, which the Respondents

believe would be inappropriate.

The Petitioners' comparison of athletic programs to "other programs like home economics or mathematics" (Pet. 13), is also flawed. As stated by the Seventh Circuit, "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics." 35 F.3d at 270. Congress recognized that athletics is different and the Petitioners should, too. In academic pursuits, students of both sexes compete against one another, while the same is not true in athletics.

The Petitioners' argument that they were discriminated against under Title IX implicitly incorporates a definition of discrimination that is much too broad. In effect, their argument is that the men and women were treated differently, and gender was taken into account, when the women's swimming program was not eliminated. Taking the Petitioners' argument to its logical extreme, having separate teams for men and women would constitute discrimination because the sexes would be treated separately, and differently because gender would be taken into account in the process of establishing and maintaining separate teams. This position is, of course, ludicrous. The University of Illinois did nothing more than take gender into account in an effort to allocate athletic opportunities equitably between the sexes in its intercollegiate athletic program as a whole. Equitable distribution of athletic opportunities should not be considered discrimination under any definition.

II. THE DECISION BY THE SEVENTH CIRCUIT DOES NOT CONFLICT WITH THE PLAIN MEANING OF TITLE IX

The Petitioners would have this Court look at only the language of Title IX, without considering the language of the regulations and Policy Interpretation promulgated thereunder, and also would have this Court disregard the case law developed under Title IX. Where, as here, Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, those regulations must be given considerable deference. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, the courts must defer to an agency's interpretation of its regulations if the

interpretation is reasonable, *Martin v. Occupational Safety & Health Review Commission,* 499 U.S. 144 (1991), a standard the Policy Interpretation meets. The Seventh Circuit upheld the regulations and Policy Interpretation, as have all the other appellate courts that have considered them. *Favia v. Indiana University of Pennsylvania,* 7 F.3d 332 (3rd Cir. 1993); *Cohen v. Brown University,* 991 F.2d 888 (1st Cir. 1993); *Roberts v. Colorado State,* 998 F.2d 824 (10th Cir. 1993). The Petitioners would have this Court depart from that settled precedent and ignore the established legislative history and recognized intent behind Title IX.

As the First Circuit determined in *Cohen v. Brown University,* Congress wanted to create "a more level playing field for female athletes. . . ." 991 F.2d at 894. The Title IX regulations and Policy Interpretation are aimed at doing just that: protecting the interests of the underrepresented gender, which is the women athletes at the University of Illinois. It is truly ironic that the Petitioners claim the protection of Title IX since they are not even members of the class sought to be protected, the underrepresented gender. It is the fact of underrepresentation, not gender, that is critical in evaluating Title IX cases.

Futhermore, Title IX and the regulations and Policy Interpretation are consistent with the Fourteenth Amendment's equal protection guarantees. Congress has broad powers under the Fifth Amendment to remedy past discrimination. *Metro Broadcasting, Inc. v. Federal Communications Commission,* 497 U.S. 547 (1990). Removal of gender discrimination in athletic programs in higher education is certainly an important governmental objective. The scheme established in the regulations and Policy Interpretation for remediating the present effects of past discrimination is substantially related to that objective and, consequently, does not violate the Equal Protection Clause. *See Cohen v. Brown University*, 991 F.2d at 900-901.

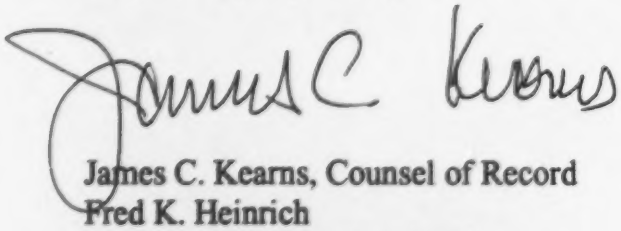
The University decided not to eliminate the women's swimming team based on the fact that women were underrepresented in its athletic program. The Petitioners would have this Court rule that the University's decision to eliminate the men's swimming program was a violation of Title IX, despite the fact that men were overrepresented in the athletic program and

remained overrepresented even after elimination of that team. If the Petitioners' argument is adopted, universities across the country will be foreclosed from eliminating any athletic teams. Their hands will be tied since they will be prevented from eliminating teams of both the underrepresented and overrepresented gender, if the Petitioners' argument is accepted. This would result in preservation of the status quo, which is certainly not the intent behind Title IX.

CONCLUSION

For the reasons stated above, the Respondents request this Honorable Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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